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Supreme Court

# In the ~~Court of Claims~~ of the United States

OCTOBER TERM, 1947

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No. 727

DINSHAH P. GHADIALI AND DINSHAH SPECTRO-CHROME INSTITUTE, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the circuit court of appeals (see Pet. 24-27) is reported at 165 F. 2d 957.

### JURISDICTION

The judgment of the circuit court of appeals was entered February 9, 1948 (R. R83).[1] On February

[1] Each volume of the transcript of record bears a letter on its cover but not all of the volumes are paginated consecutively. The references herein are to the lettered volumes and their respective pagination.

25, 1948, Mr. Justice Burton extended petitioners' time for filing a petition for a writ of certiorari to April 9, 1948. The petition was filed April 8, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether failure to conduct an administrative hearing before initiating the prosecution, as required by Section 305 of the Federal Food, Drug and Cosmetic Act, was a jurisdictional bar to the prosecution.

2. Whether it was error to receive testimony concerning the curative power of Spectro-Chrome devices other than the specific ones involved in the indictment.

3. Whether members of the medical profession were qualified to testify concerning the alleged curative powers of the device.

4. Whether evidence of good faith and pure motive was improperly excluded from the trial.

5. Whether the trial judge unnecessarily limited petitioners in establishing the qualifications, experience and scientific standing of petitioner Ghadiali.

6. Whether it was an abuse of discretion by the trial judge to refuse to take the jury to petitioners' laboratory to view experiments.

7. Whether there were any prejudicial errors in the charge to the jury.

8. Whether the prosecuting attorney was guilty of misconduct during the course of the trial.

9. Whether the terms of probation imposed on petitioner Ghadiali are invalid.

STATUTES INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040 (21 U. S. C. 301 et seq.), provides in pertinent part:

> SEC. 201. For the purposes of this Act——
>
> * * * * * * *
>
> (m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.
>
> * * * * * * *
>
> SEC. 301. The following acts and the causing thereof are hereby prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.
>
> * * * * * * *
>
> SEC. 303. (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has

become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

* * * * * * *

SEC. 305. Before any violation of this Act is reported by the Administrator to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding.

SEC. 502. A drug or device shall be deemed to be misbranded—(a) If its labeling is false or misleading in any particular.

The Act of March 4, 1925, c. 521, 43 Stat. 1259 (18 U. S. C. 724), provides in part:

The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or

may change the period of probation. *Provided,* That the period of probation, together with any extension thereof, shall not exceed five years.

* * * * * * *

STATEMENT

On August 5, 1945, petitioners were indicted (R. R4-51) in the United States District Court for the District of New Jersey in twelve counts, each alleging that petitioners violated Section 502(a) of the Federal Food, Drug and Cosmetic Act by introducing into interstate commerce a device known as "Spectro-Chrome" which it was claimed would cure disease by exposure to colors, and which was alleged to be misbranded in that it was represented that the device could cure, mitigate, treat or prevent substantially all of the known diseases of the human race.[2] Both petitioners were convicted on all counts. The corporate petitioner was fined a total of $12,000 (R. S16). Petitioner Ghadiali was fined $1,000 on each of the first eight counts and sentenced to consecutive terms of imprisonment for one year on the first three counts. Execution of the imprisonment sentences was suspended and Ghadiali was placed on probation for five years.[3] On the

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[2] A related case involving the seizure of a "Spectro-Chrome" device was before this Court on petition for a writ of certiorari in *Olsen* v. *United States,* No. 230, October Term, 1947, certiorari denied, 332 U. S. 768.

[3] The conditions of probation include the following (R. R56-57): (1) That he disassociate himself in all respects and manner from the promotion of Spectro-Chrome or Spectro-Chrome Metry, its teachings and literature; (2) that he dissolve the Dinshah Spectro-Chrome Institute; (3) that he deliver over all of his literature to

last four counts, imposition of sentence was suspended and probation imposed. (R. S16-18, R56-57.)

Since petitioners do not challenge the sufficiency of the evidence, there is no occasion to summarize in detail the evidence which was adduced at their lengthy trial. The essential facts are set forth in the opinion of the court below (see Pet. 25-26). Suffice it to say that petitioner Ghadiali and his personally dominated corporation profited handsomely from the sale of their devices, which consisted principally of a one thousand watt electric light bulb, a water container and fan for cooling purposes, and two condensing lenses to focus the rays from the bulb which shine through colored glass slides of the commercial window pane type. The devices were sold for the cure of all diseases of mankind.

ARGUMENT

Petitioners raise numerous questions of law which, so far as we are able to understand them, present nothing of substance and do not require extended discussion.

1. Petitioners' first contention (Pet. 27-29) is that, pursuant to Section 305 of the Act, the Administrator should have accorded them an opportunity to present their views before referring the matter to the United States Attorney for prosecu-

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the Government for destruction; (4) that he discontinue, directly or indirectly, the service of free guidance; (5) that he discontinue the editing of his Spectro-Chrome magazine.

tion, and that the failure to do so forecloses the prosecution. As recently as 1943, this Court held in respect of Section 305 that the giving of such an opportunity "is not a prerequisite to prosecution." *United States* v. *Dotterweich,* 320 U. S. 277, 278-279.

2. Petitioners next contend (Pet. 29-40) that the proof exceeded the scope of the indictment. In the course of the trial, the Government called expert witnesses who had examined and used Spectro-Chrome devices of the same kind as those involved in the indictment, and they testified concerning the alleged curative powers of the devices. Petitioners urge that this testimony was improper because it did not relate to the twelve specific machines on which the charges of the indictment were based. The short answer is that evidence of what other Spectro-Chrome devices—admittedly identical in principle with the devices involved in the indictment—were capable of doing was probative on the issue whether the twelve machines in question were misbranded. It long has been recognized that proof in respect of similar machines or devices is admissible to show that the device in question was incapable of substantiating the claims made in its behalf. See *Ames* v. *Quimby,* 106 U. S. 342; *Ward* v. *Blake Manufacturing Co.,* 56 Fed. 437 (C. C. A. 8); *Waters' Patent Heater Co.* v. *Smith,* 120 Mass. 444.

Petitioners also urge that it was error to admit testimony showing that even before the twelve devices in question were shipped, other persons had used similar Spectro-Chrome devices without curative success. But evidence as to actual experiences with such devices is the most convincing proof of what they are capable or incapable of doing. Indeed, petitioners' literature which accompanied the devices abounds with case histories in which the devices supposedly effected cures. The Government's evidence established the falsity of these statements and illustrated that actual experience proved the falsity of the labeling.

3. The argument (Pet. 40-50) that the Government's expert medical witnesses should not have been permitted to testify because they were not members of the "school of healing" fostered by petitioners and therefore were not capable of evaluating the alleged curative powers of the devices has no foundation in law. While it is true that the skill of any practitioner must be judged in the light of the standards of the school to which he belongs, it does not follow that only members of petitioners' school may testify as experts. The rule is stated in *Williams* v. *Marini,* 105 Vt. 15, as follows:

> We agree that the defendant's care of this patient must be tested by what good osteopathic treatment required, and by that alone. *Wilkins, Admr.* v. *Brock,* 81 Vt. 332, 344, 70 Atl. 572. And we will assume that the case was

> such that it required expert evidence from qualified osteopaths to sustain it. This does not imply, however, that only practitioners of that school could be used as experts at the trial. Very many questions pertaining to the diagnosis, physical conditions and what they indicated, the progress of the infection and other observed facts and their significance, could be established by regular physicians; indeed, some of them, at least, could be shown by unskilled observers.

In this case, experts in the fields of diabetes, cancer, tuberculosis, arteriosclerosis, and heart disease conducted clinical investigations with Spectro-Chrome devices on persons suffering from these diseases to determine whether the claims made for the devices were true. Other doctors testified concerning their treatment of ailing persons who had been users of the devices. The witnesses were trained to diagnose and treat disease, and they were capable of determining whether the devices actually aided in the treatment of various diseases or whether their magic was confined solely to their labeling. Petitioner Ghadiali's view would mean that only he and his followers are qualified to testify concerning the asserted curative powers of the devices, and this, of course, would be iron-clad insurance against the enforcement of the Act in respect of his activities.

4. Petitioners' contention (Pet. 50-52) that they should have been permitted to adduce evidence of

their good faith is answered by the fact that motive or intent is not an element of the offenses for which they were convicted. Even if petitioners had acted in good faith they would have been guilty of the offenses in question. *United States* v. *Dotterweich*, 320 U. S. 277, 280.

5. Petitioner Ghadiali's complaint (Pet. 52-64) that he was not permitted to establish his qualifications, experience and scientific standing fails to distinguish between offers of incompetent proof and of proof which was properly admissible. Thus, petitioner's character witnesses were permitted to testify for him (R. J4277, K4852, 4854, 4855), but, on the other hand, the court excluded offers of press clippings concerning petitioner Ghadiali. Obviously, the latter were not probative evidence; they were hearsay of the plainest kind. Similarly, it is difficult to understand the relevance of tendered exhibits showing that in 1892 Ghadiali was an assistant to a mathematics professor at Wilson's College, or showing "his former position with the New York Police Reserve Air Service" (Pet. 55). It is evident that in seeking to present such exhibits petitioner Ghadiali gave scant regard to such matters as relevancy, hearsay and authenticity. We perceive nothing in petitioners' arguments which show that the trial judge erred in the exclusion of any of the items of which complaint is made.

6. Petitioners now complain (Pet. 64-73) that it was error for the trial judge not to permit the jury to view experimental demonstrations in their laboratory some thirty miles from the courtroom. But, of course, this was a matter for the discretion of the trial judge. Petitioners point to nothing which shows an abuse of discretion.

7. The trial judge properly rejected petitioners' requested instruction (see Pet. 73) suggesting that members of the medical profession held biased opinions in respect of petitioners' system of "healing," for there is no warrant for such a statement. The statement of the court that deception may result from the use of statements not technically false or which may be literally true (Pet. 73) finds support in substantially the same statements by this Court in *Donaldson* v. *Read Magazine,* No. 50, decided March 8, 1948 (slip opinion pp. 10-11), and in *United States* v. *95 Barrels of Vinegar,* 265 U. S. 438, 442. Petitioners point to no meritorious requested instructions which were improperly refused, nor do they show that they excepted to the charge as given. In the circumstances, there is no basis for challenging the charge. Rule 30, F. R. Crim. P.

8. Petitioners do not urge the point, but under the title "Some Closing Remarks" they cite (Pet. 92-96) isolated fragments of questions and comments by the Assistant United States Attorney who

prosecuted the case, evidently with the purpose of suggesting improper conduct on his part. The quotations in question have been culled out of a 42-day trial record and were made in the course of a trial which necessarily was much less formal than the usual trial, because of Ghadiali's insistence on defending himself. Suffice it to say that petitioners found none of the matters of sufficient importance to justify a motion for a mistrial. Instead, they were satisfied with the trial judge's admonitions and cautionary remarks to the jury. The case was hard fought, but not unfairly.

9. Petitioners' remaining contentions (Pet. 78-92) relate to the judgment of the trial court. Petitioner Ghadiali was sentenced to pay a fine of $1,000 on each of the first eight counts of the indictment and in addition a sentence of one year's imprisonment was imposed on each of the first three counts, the sentences to be served consecutively. Execution of the sentence to imprisonment was suspended and Ghadiali was placed on probation for five years. In addition, imposition of sentence on the last four counts of the indictment was suspended and Ghadiali was placed on probation for five years on the same terms as the probation on the first three counts.

Petitioners' basic complaint relates to the terms of probation which, as the trial judge stated (see Pet. 24), are framed "to bring to a complete stop the promotion of this so-called science in this coun-

try." The specific conditions of probation (see pp. 5-6, *supra*) require Ghadiali to stop all the activities related to the distribution of the Spectro-Chrome device for which he was convicted. Petitioners suggest that this is unwarranted, but the short answer is that the probation statute (18 U. S. C. 724), having regard for the best interests of the public, authorizes the trial judge to place the defendant on probation "upon such terms and conditions" as he may deem best. In the light of the conviction, it is plain that the trial judge properly conditioned probation on petitioner Ghadiali's not participating in such illegal activities during the period of probation. The alternative to such conditions would have been to incarcerate Ghadiali so he would be unable to carry on his illegal acts. As the beneficiary of the milder sanction, Ghadiali is hardly in a position to complain. Compare *Stone* v. *United States,* 153 F. 2d 331 (C. C. A. 9), and *United States ex rel. Greenhaus* v. *Warden,* 14 F. Supp. 366 (S. D. N. Y.), affirmed, 85 F. 2d 116 (C. C. A. 2), certiorari denied, 299 U. S. 596, where terms of probation similar to those imposed on Ghadiali were sustained.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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